



Submitted by the
Task Force on Appellate Mediation
Hon. Ignazio J. Ruvolo, Chair
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Mandatory Mediation in the First Appellate District of the Court of Appeal Report and Recommendations

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EXECUTIVE SUMMARY

In 1997, Chief Justice Ronald M. George appointed a Task Force on Appellate Mediation to determine whether to propose an experimental mediation program for civil appeals in the First Appellate District of the Court of Appeal. The task force recommended a pilot program to include:

- ▶ Mediation on a mandatory and confidential basis for selected civil cases;
- ▶ Minimal disruption of appellate procedures and deadlines;
- ▶ Mediators chosen by the court from among appellate attorneys, mediators, and retired judges who successfully complete a training course sponsored by the court;
- ▶ Implementation and administration by an administrator, with oversight by the court; and
- ▶ An evaluation after the program has been operating for a period of time.

The Judicial Council incorporated the task force proposals into its approved plans and authorized the Administrative Director of the Courts to proceed with implementation. Funding was requested in the Governor's 1999/2000 budget and was appropriated by the Legislature for a two-year pilot program to commence on July 1, 1999, and to extend through June 30, 2001.

Program goals have been to address the interests of both litigants and the court by:

- ▶ Reducing costs;
- ▶ Reducing time to resolution;
- ▶ Reducing the adversary culture of litigation;
- ▶ Increasing litigant satisfaction with the judicial process; and
- ▶ Increasing dispositions without judicial intervention.

During the period July 1, 1999, through January 31, 2000, staff was hired, mediation trainers were retained, mediators were recruited and trained, and program rules were adopted. Operations began in February 2000 with the first submissions of appeals to mediations. The first mediations took place in March 2000.

During the pilot period, 1,328 civil appeals were assessed for mediation. Twenty-two percent, or 288, were submitted to the program. The most frequent subjects were business/contract, employment, real estate, family law, probate, and insurance. Submitted appeals mostly arose from judgments following court trials, summary judgments, jury trials, and trial court orders.

Appeals were submitted from 11 of the 12 counties in the First Appellate District. Appeals were most frequently submitted from the superior courts of San Francisco, Alameda, Contra Costa, San Mateo, Marin, and Solano Counties.

The settlement rate was 43 percent. This is a high success rate considering the obstacles to settling cases at the appellate level. In addition, a significant number of cases settled before their scheduled mediations. In successful mediations, the time from notice of appeal to resolution was reduced from approximately 14 months to about 4 months, thereby saving parties from costly briefing in almost all cases.

The First Appellate District trial courts also benefited from the success of the program. For example, some mediations resolved matters pending in the trial courts, in addition to the appeal. Furthermore, a number of the settled cases

would otherwise have resulted in reversals and remands to the trial courts for further proceedings.

Those cases that did not settle also benefited because the mediation process highlighted the strengths and weaknesses of each party's position. This sharper focus narrowed the issues, improved the briefing, and made for better oral arguments, to the profit of both the parties and the court.

The mediation program has achieved substantial savings for the parties and the court, primarily through early intervention, before briefing. In the appeals that have been settled through mediation during the pilot period, counsel have estimated the cumulative savings for the parties in excess of \$7.1 million. After the costs of unsuccessful mediations are offset, the estimated net savings to parties participating in the mediation program were more than \$6.2 million.

Since all of the settlements occurred before respondents' briefs were filed, there was a significant saving of court resources. There is evidence that appellate mediation is an effective tool for reducing appellate court caseloads.

To protect confidentiality, neither the fact of submission to the mediation program nor any information revealed in the mediation is disclosed to the court.

Evaluations by mediation participants of the mediation process, the mediators, and program administration were very positive. The great majority of parties and counsel would use the process and the mediators again. Evaluations and commendations received from mediation participants attest that the mediation program has been meeting its goals of reducing costs, time to resolution, and the adversary nature of litigation, while increasing dispositions without judicial intervention and litigant satisfaction with the judicial process.

RECOMMENDATIONS

- 1.** The mediation program should be extended indefinitely in the First Appellate District.
- 2.** Participation in the mediation program should continue to be mandatory.
- 3.** Court-sponsored training should remain an integral part of any appellate mediation program.
- 4.** The program should retain its pro bono feature. However, the number of pro bono hours demanded from mediators should be limited. After the limit has been reached, mediators should receive reasonable compensation from the parties.
- 5.** The results of the pilot program are achievable in other appellate districts. Other appellate districts should have the option of developing or expanding their own alternative dispute resolution programs, with the financial assistance of the Administrative Office of the Courts, if necessary.

Mandatory Mediation in the First Appellate District of the Court of Appeal Report and Recommendations

This report reviews the two-year pilot program for mandatory mediation of civil appeals in the Court of Appeal, First Appellate District. The pilot period began on July 1, 1999, and concluded on June 30, 2001.

PROGRAM ORIGINS

In 1997, Chief Justice Ronald M. George appointed a Task Force on Appellate Mediation to determine whether to propose an experimental mediation program for civil appeals in the First Appellate District of the Court of Appeal. The original task force members were Hon. Robert L. Dossee, Chair; Hon. Barbara J. R. Jones; Hon. Ignazio J. Ruvolo; First Appellate District Principal Attorney Jack Darr; and John E. Mueller, Esq., of Nielsen, Merksamer, Parrinello, Mueller & Naylor, Mill Valley. Larry Sipes, former Administrative Office of the Courts scholar-in-residence, served as a consultant. Upon Justice Dossee's retirement from the court, Justice Ruvolo became chair of the task force. Justice Dossee remains a task force member.

The task force submitted its report and recommendations to the Judicial Council in February 1998. The report recommended that a new program of appellate mediation for civil appeals be established in the First Appellate District. Other recommendations were that the pilot program should provide:

- ▶ Mediation on a mandatory and confidential basis for selected civil cases;
- ▶ Minimal disruption of appellate procedures and deadlines;
- ▶ Mediators chosen by the court from among appellate attorneys, mediators, and retired judges who successfully complete a training course sponsored by the court;
- ▶ Implementation and administration by an administrator, with oversight by the court; and
- ▶ An evaluation after the program has been operating for a period of time.

The Judicial Council incorporated the task force proposals into its approved plans and authorized the Administrative Director of the Courts to proceed with implementation. Funding was requested in the Governor's 1999/2000 budget and was appropriated by the Legislature for a two-year pilot program to commence on July 1, 1999, and to extend through June 30, 2001.

The goals of the appellate mediation program are to reduce costs, time to resolution, and the adversary culture of litigation, while increasing litigant satisfaction and dispositions without judicial intervention.

PROGRAM GOALS

Program goals have been to address the interests of both litigants and the court by:

- ▶ Reducing costs to the parties and the court;
- ▶ Reducing time to resolution;
- ▶ Reducing the adversary culture of litigation;
- ▶ Increasing litigant satisfaction with the judicial process; and
- ▶ Increasing dispositions without judicial intervention.

CHRONOLOGY

1999

JUNE

- ▶ A job announcement was issued for a mediation program administrator.

JULY

- ▶ Drafts of proposed mediation rules and operational plan were approved.

AUGUST

- ▶ A request for proposal for mediation trainers was issued.

SEPTEMBER

- ▶ Interviews for the mediation program administrator position were conducted.
- ▶ A job announcement was issued for a mediation program coordinator.

OCTOBER

- ▶ The mediation program administrator was selected.

NOVEMBER

- ▶ The mediation program administrator assumed his duties.
- ▶ Mediators and appellate attorneys were recruited for the mediator panel.
- ▶ Interviews for the mediation program coordinator position were conducted.
- ▶ Bidders for the mediation training contract were interviewed.
- ▶ The mediation program coordinator was selected.
- ▶ The task force finalized program rules and the operational plan.
- ▶ A bid for mediation training was accepted.

DECEMBER

- ▶ The mediation program coordinator assumed his duties.
- ▶ The court approved local rule 3.5, Mediation in Civil Appeals, and the operational plan.
- ▶ Recruitment of the first group of mediators and appellate attorneys was completed.

2000

JANUARY

- ▶ The mediation program administrator issued a quarterly status report to the Task Force on Appellate Mediation.

FEBRUARY

- ▶ On February 1, local rule 3.5, Mediation in Civil Appeals, became effective.
- ▶ The mediation program began active operations.
- ▶ A total of 47 experienced mediators and appellate attorneys completed the first appellate mediation training.
- ▶ An automated case management system became operational.
- ▶ The first Case Screening Forms were received from counsel.
- ▶ The first appeal, in an employment dispute, was submitted to mediation on February 16.

MARCH

- ▶ An additional 53 experienced mediators and appellate attorneys completed mediation training.
- ▶ Twenty-eight cases were submitted to mediation.
- ▶ The first four mediations were completed.

APRIL

- ▶ The mediation program administrator issued a quarterly status report to the task force.

MAY

- ▶ The task force reviewed the progress of the program, mediator training, and budget considerations.
- ▶ A seminar was held to familiarize appellate attorneys with the mediation program.
- ▶ The mediation program administrator met with panel mediators in San Francisco to review program operations and to discuss issues of common interest.

JUNE

- ▶ A software consultant reviewed and modified the case management system.

JULY

- ▶ The task force published its report on the first year of the pilot program.

OCTOBER

- ▶ The mediation program administrator issued a quarterly status report to the task force.
- ▶ A third training, for 50 mediators, was completed.

NOVEMBER

- ▶ The mediation program administrator met with panel mediators in San Francisco for a second time to review program operations and to discuss issues of common interest.

DECEMBER

- ▶ Mediation program forms and a list of panel mediators were added to the California courts Web site, www.courtinfo.ca.gov.

2001

JANUARY

- ▶ The mediation program administrator issued a quarterly status report to the task force.

MARCH

- ▶ The mediation program administrator met with panel mediators in Palo Alto to review program operations and to discuss issues of common interest.

APRIL

- ▶ The court, on the recommendation of the task force, amended local rule 3.5(d)(8) to strengthen the attendance and authority requirements for mediation participants.
- ▶ The mediation program administrator issued a quarterly status report to the task force.

MAY

- ▶ The mediation program administrator met with panel mediators in San Francisco for a third time to review program operations and to discuss issues of common interest.

PROGRAM RULES

Key provisions of local rule 3.5, Mediation in Civil Appeals (Attachment 1), include:

- ▶ **Subdivision (a).** *Mediation Program.* Local rule 3.5 does not replace local rule 3, concerning voluntary settlement conferences, but creates an alternative dispute resolution (ADR) process.
- ▶ **Subdivision (b).** *Scope of Mediation Program.* Any civil appeal may be placed in the program if selected by the administrator or requested in writing by a party.
- ▶ **Subdivision (c).** *Mediators.* Mediators serve pro bono for the first six hours of the mediation session (plus preparation). They may charge market rates thereafter, if the parties agree.

- Subdivision (d). Mediation Process.** Mediation occurs as soon as practicable after the filing of the *Notice of Appeal*, concurrent with the appellate process. The administrator controls scheduling to promote early mediation for maximum savings in record preparation and briefing. Persons with full authority to settle are required to attend mediation sessions. Mediators are required to submit Mediation Attendance Forms and Mediator's Statements. Parties and their counsel are required to submit evaluations.
- Subdivision (e). Confidentiality.** Confidentiality, among mediation participants and within the court, is essential to a viable program. See *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1.
- Subdivision (g). Sanctions.** Monetary sanctions are available to enforce compliance with the rules by parties and their counsel. However, the program relies mostly on reason and cooperation.

MEDIATION PROGRAM ADMINISTRATOR

John Toker assumed administrative responsibilities on November 1, 1999. Mr. Toker was the Alternative Dispute Resolution Administrator for the Superior Court of Santa Clara County from May 1998 through October 1999. He was an attorney with the Administrative Office of the Courts for 16 years, concentrating on civil law matters, including alternative dispute resolution. He was a trial lawyer for 12 years in Philadelphia and San Francisco. Mr. Toker has written and lectured extensively about ADR. His principal functions are to recruit mediators, assess appeals for submission to mediation, and assign mediators whose experience and skills are matched to each case. Mr. Toker also prepares budgets and reports and acts as staff for task force meetings, among other duties.

MEDIATION PROGRAM COORDINATOR

Kenneth Sogabe was selected for this support position based on his outstanding administrative skills. Mr. Sogabe was a senior case manager at Judicial Arbitration and Mediation Services (JAMS) in San Francisco. He received his juris doctorate in December 2000 from Golden Gate University School of Law and was admitted to the California Bar in June 2001. Mr. Sogabe has developed an automated case management system to track cases, mediators, and expenditures. His other principal functions are to schedule mediations and to coordinate procedures with attorneys, mediators, and court staff.

MEDIATORS

The court has recruited attorneys, retired judges and justices, and professional lay mediators to serve as neutral parties in the mediations. These neutrals are qualified according to training, experience, and performance. Applicants must identify three persons familiar with their mediation and/or appellate skills. (See Attachment 2, the Mediator Application.) The applicants receive intensive training in appellate mediation sponsored by the court.

The team of Richard Birke and Dana Curtis was chosen as mediation trainers, based on their substantial appellate mediation experience. Richard Birke is a tenured professor at Willamette University College of Law in Oregon and director of that school's Center for Dispute Resolution. Previously, he taught at Stanford Law School. Professor Birke has participated in Oregon's appellate mediation program. He has written and lectured extensively about appellate mediation. Dana Curtis was a law clerk for California Supreme Court Associate Justice Edward Panelli. After an association with McCutchen, Doyle, Brown & Enersen in San Francisco, Ms. Curtis was a staff mediator for the United States Court of Appeals, Ninth Circuit, in San Francisco. She teaches mediation at Stanford Law School. Both Professor Birke and Ms. Curtis maintain private mediation practices. Each previously conducted appellate mediation trainings.

Two trainings were conducted between January and the end of March 2000. A third training took place in September and October 2000. Appellate attorneys with little or no mediation experience participated in fundamental and advanced training. Experienced mediators took the advanced training. All completed an orientation and a concluding session on appellate issues. Total training time for the less experienced mediators was 31 hours, excluding breaks. For the advanced mediators, it was 19 hours.

The training involved lectures, demonstrations, role-play, and debriefing, with coaching by experienced mediators. The principal subjects covered in the trainings were:

- A comparison of the appellate process and the mediation process;
- Standards of appellate review;
- Reversal rates;
- Program rules;
- Ethical standards for mediators;
- Confidentiality;
- Negotiated problem solving;
- Communication skills;
- Risk analysis;
- Structuring the mediation;
- Understanding the dispute from each party's perspective;
- Defining problems to be solved;
- Caucusing;
- Generating and testing options;
- Reaching resolution; and
- Drafting a memorandum of understanding.

The panel of mediators includes 146 persons who have completed the training. (See Attachment 3.) Approximately two-thirds are experienced mediators. The others are appellate specialists. These panel members include two retired appellate justices and three retired trial court judges.

The training was free to the participants. In exchange, panel members agreed to accept up to four assignments from the court on a generally pro bono basis. To augment the training, the administrator and one of the trainers met with members of the mediator panel on four occasions to discuss mediation techniques, confidentiality, ethics, co-mediation, and other topics of common interest.

MEDIATION PROCESS

Shortly after the *Notice of Appeal* is filed, counsel receive a copy of local rule 3.5 and an information sheet explaining the advantages of mediation and the mediation process (Attachment 4). A Case Screening Form (Attachment 5) is provided at the same time. The information entered on the Case Screening Form is reviewed by the mediation program administrator, who assesses the amenability of the appeal for mediation. The form is designed to elicit specifics such as the basic facts of the case, anticipated appellate issues, a history of negotiations, related cases, and whether the case is one of first impression or involves the interpretation of a statute or regulation. For additional information, counsel is asked to attach a copy of any judgment, findings of fact, statement of decision, or order appealed from, in lieu of the trial court record. In most cases, the administrator will confer with counsel for further input to determine if a case should be submitted to mediation and to assess the motivation of the parties to mediate.

If an appeal is submitted to mediation, the administrator will assign a mediator whose skill and experience are matched to the appeal. The assigned mediator serves pro bono for preparation time and the first six hours of session time. If a resolution is not achieved within six hours, the parties may agree to continue and compensate the mediator for any additional time at a market rate. The parties have an option to agree to an alternative mediator from the panel or to a private mediator, as long as that mediator agrees to follow court rules and procedures. Alternative mediators and private mediators usually require full compensation.

The coordinator schedules the mediations. This serves two purposes. First, it eases the mediator's administrative burden, in recognition of his or her pro bono service. Second, it makes for a more efficient process than leaving the responsibility to the mediator and counsel. During the scheduling process, the mediator checks for possible conflicts of interest.

Once a mediation date is set, the administrator sends a confirming letter to counsel, with information describing how to prepare for appellate mediation (Attachment 6). This information helps the parties to organize their presentations and to adjust to a process that is collaborative rather than adversarial. The likelihood of settlement is thereby increased.

The mediator receives a copy of the confirmation letter and a packet from the administrator. The packet contains local rule 3.5, the Case Screening Forms and attached documents, a Confidentiality Agreement (Attachment 7), a Mediation Attendance Form (Attachment 8), a Mediator's Statement (Attachment 9), and a Mediation Evaluation (Attachment 10). All mediation participants are to sign the Confidentiality Agreement and fill out the Mediation Attendance Form. Parties and their counsel must submit the Mediation Evaluation within 10 days of the completion of the mediation.

The mediator follows his or her preferred procedures for the mediation itself. Most mediators hold telephone conferences with counsel before the mediation to discuss procedures. Short written briefs normally are requested.

Mediations may take place at the mediator's office or counsel's office. In addition, program administration provides conference rooms for mediations at the State Office Building in San Francisco.

To protect confidentiality, neither the fact of submission to the mediation program nor any information revealed in the mediation is disclosed to the court.

SUBMISSIONS TO MEDIATION

During the pilot period, 1,328 civil appeals were assessed for mediation. Twenty-two percent, or 288, were submitted to the program. As shown in Figure A, the most frequent subjects were business/contract, employment, real estate, personal injury, family law, probate, and insurance. Many of these appeals also involved attorney's fees. Submitted appeals most often involved judgments following court trials, summary judgments, jury trials, and trial court orders.¹ See Figure B.

FIGURE A
SUBMISSIONS AND SETTLEMENTS
ACCORDING TO SUBJECT

SUBJECT	PERCENTAGE OF SUBMISSIONS	PERCENTAGE OF SETTLEMENTS	SETTLEMENT RATE
Business/contract	21	23	47%
Employment	14	8	30%
Family law	8	12	65%
Insurance	5	2	20%
Personal injury	10	13	43%
Probate	7	10	53%
Real estate	13	14	43%
Other ²	22	18	41%

FIGURE B
SUBMISSIONS AND SETTLEMENTS
ACCORDING TO SOURCE OF JUDGMENT

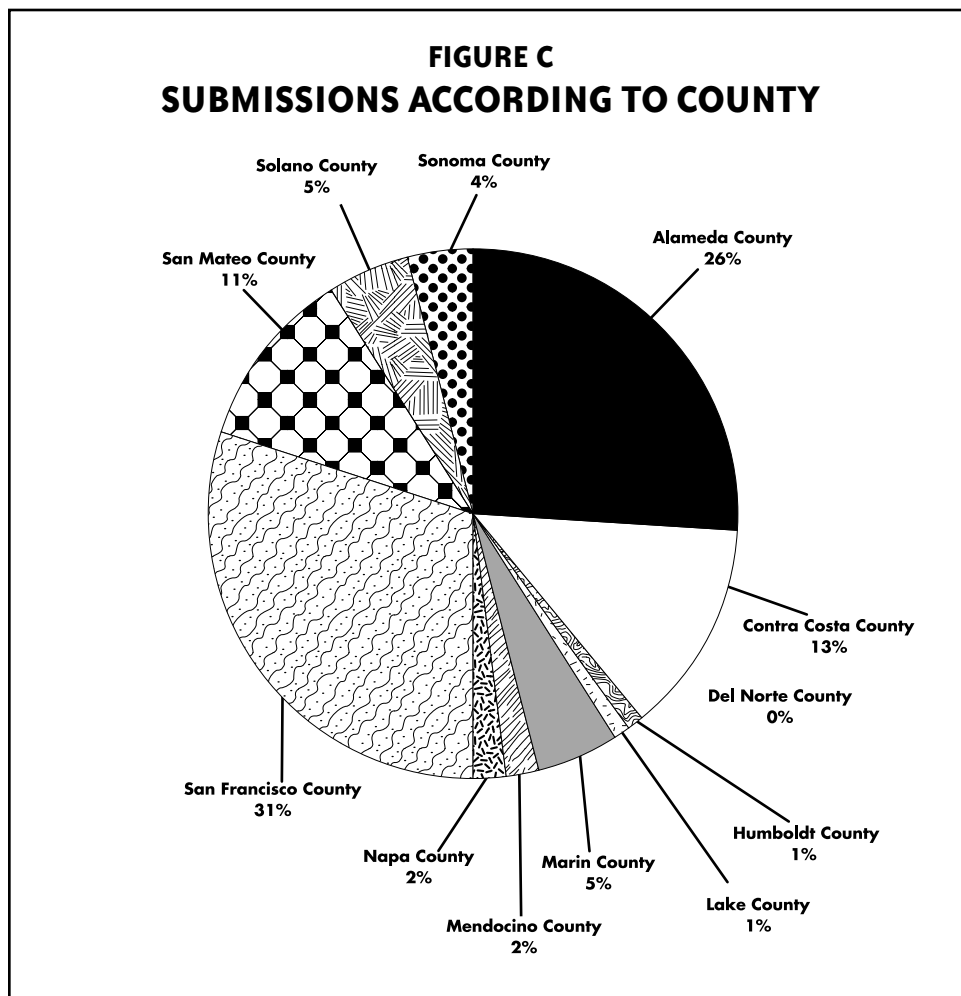
JUDGMENT RESULTING FROM	PERCENTAGE OF SUBMISSIONS	PERCENTAGE OF SETTLEMENTS	SETTLEMENT RATE
Jury trial	19	21	44%
Court trial	25	26	44%
Summary judgment	20	20	39%
Demurrer	3	2	40%
Administrative mandamus	3	4	80%
Orders	18	18	45%
Other ³	12	9	31%

¹Representative orders concerned child or spousal support, probate distribution, trusts, arbitration, injunctive relief, defaults, new trials, and awards of attorney's fees and costs.

²Includes attorney's fees, construction, intellectual property, medical malpractice, and professional negligence, among other subjects.

³Includes judgments resulting from dismissals, nonsuits, and arbitration awards, among other sources of judgments.

Appeals were submitted from 11 of the 12 counties in the First Appellate District (Figure C). Appeals were most frequently submitted from the superior courts of San Francisco, Alameda, Contra Costa, San Mateo, Marin, and Solano Counties.



SETTLEMENTS

There was full resolution in 43.2 percent of completed mediations (92/213). This is a high success rate considering the obstacles to settling cases at the appellate level.

The mediation program alternatively seeks to achieve partial resolution, that is, agreement on one or more issues, when full resolution cannot be obtained. There were four partial resolutions during the pilot period, raising the overall settlement rate for completed mediations to 43.3 percent.⁴

⁴A partial settlement is counted as half of a full settlement.

The settlement rate for completed mediations was 43 percent. In addition, a significant number of cases settled before scheduled mediations or through global mediations.

FACTORS AFFECTING MEDIATIONS

A number of factors affect the decision of whether a matter should be submitted to mediation. These include which party prevailed in the trial court, the subject matter of the appeal, and the source of the judgment.

Our experience has shown that often respondents are resistant to compromising their trial court judgments. A great amount of money, time, and emotion may have been expended. Positions are likely to have hardened. To deal with these factors, mediators must elicit and emphasize the interests of the parties in resolution. These interests include avoiding the risk of reversal, saving the costs of the appeal and possible further trial proceedings, realizing the time value of early payment, achieving a greater gain than the court can offer, and getting on with their lives.

As shown in Figures A and B and discussed below, certain types of cases are more likely to settle. The subject matter of most settled appeals (Figure A) included, in descending order, family law, probate, business/contract, personal injury, real estate, and employment. Full resolution was achieved in appeals involving judgments primarily from court trials, jury trials, trial court orders, and summary judgments. (See Figure B.)

Another factor is whether the parties have participated in ADR before the appeal. Our experience shows there is a greater likelihood of settlement on appeal if the parties have not previously participated in an ADR process. Previous demands and offers for settlement indicate whether there is a reasonable prospect for resolution.

Cases of first impression, where there are no controlling legal precedents, normally are not appropriate for mediation. In such cases, most often the parties may desire an appellate opinion to decide the case and provide guidance for future disputes. This is particularly true for parties that litigate frequently, such as insurance companies, corporations, and public entities. On some occasions, parties have preferred to mediate a case of first impression rather than risk a precedent that may harm them in the future.

Another important factor is whether there is an ongoing relationship between the parties, such as parents with minor children, employers who wish to keep good employees, or companies that want to continue a business relationship. In such instances, mediation is likely to be much less disruptive of the relationship than litigation. All of these factors are explored in the Case Screening Form and discussed with counsel in determining submission to mediation.

TIMING OF SETTLEMENTS

Appellate mediation typically resolves cases at one of three stages in the appeal. The first stage is after contact by the mediation program, but before a scheduled mediation. Except for oral argument, appellate practice emphasizes writing rather than interaction with other counsel. Unless one side takes the initiative, attorneys normally do not discuss settlement at the appellate level. By instituting mediation, the Court of Appeal both removes the onus of taking the first step and affords a forum for settlement discussions. Premediation settlements are bonuses that are not counted as program resolutions because there is no mediation session.

Most settlements occur at the initial mediation session, after the parties and their counsel have presented their sides of the dispute and agree on a resolution acceptable to all.

A significant number of settlements also occur after mediation sessions, as a result of those sessions. Sometimes parties and their counsel need time to reflect on the discussion at the mediation sessions and to assess the financial, emotional, and other consequences of the proposed resolution versus continued litigation. For this reason, mediators are encouraged to follow up with the parties with additional sessions or telephone calls so long as there is a reasonable possibility of settlement.

Consistent with the goals of the mediation program, there was a dramatic reduction in the time to resolution for cases settled in the mediation program. During FY 2000/2001, the average time from the filing of the *Notice of Appeal* to a mediated *settlement* for civil appeals, as reported by counsel, was 3.9 months. The median time from the filing of the *Notice of Appeal* to *disposition* for mediated settlements was 5 months, compared to 14 months to disposition by opinion for all cases. The approximate 1-month period between settlement and disposition was required to formalize and to fully execute agreements reached through mediation. In 90 percent of the reported settlements, resolution occurred before briefing, which normally is the most costly phase of an appeal.

GLOBAL SETTLEMENTS

It is not unusual for an appeal to be one of a number of disputes between the same parties. There may be one or more related appeals, trial court proceedings, or even disputes not yet in litigation. A common instance involves attorney's fee motions pending in the trial court while the judgment is on appeal. Other examples include individual appeals based on separate contracts, or tort actions and related indemnity agreements giving rise to separate appeals. Appellate mediations are designed to resolve all disputes between parties. Often they achieve this goal.

One example concerned an appeal of a judgment in a complex real estate foreclosure action. Five parties were involved. The mediation settled not only the appeal, but also two actions for indemnity pending in the trial court and another claim yet to be filed. In another case, the mediator was able to assist the parties in resolving the appeal and a related federal bankruptcy action. When global settlements occur, the resolution rates discussed above actually underestimate the true effectiveness of the mediation program, because they reflect only the initial

Many attorneys don't take the initiative for settlement negotiations at the appellate level. By instituting mediation, the Court of Appeal both removes the onus of taking the first step and affords a forum for settlement discussions.

appeals reviewed by the administrator. The data do not reflect the additional benefits of related appeals, trial court actions, or other disputes that also are resolved in a global mediation.

PROGRAM SAVINGS

The mediation program is designed to save time and money for the parties. Another major objective is taxpayer savings, through cost avoidance to the court. Evaluations received from parties' counsel demonstrate that these goals have been achieved.

PARTY SAVINGS

The primary goal of the mediation program is to reduce the cost of the appeal for the parties. This has been achieved by early intervention, normally before briefing. Briefing usually is the most expensive part of the appeal. Counsel have reported settlement before briefing in 70 out of 78 cases (90 percent). Of the eight appeals resolved during briefing, four were settled before the filing of the appellant's opening brief. The remaining four were resolved before the filing of the respondent's brief.

In appeals that have been settled through mediation, average estimated savings of attorney's fees ranged from \$45,367 (appellants) to \$21,269 (respondents). In addition, average savings of other costs were estimated from \$5,818 (appellants) to \$3,844 (respondents). In one case, appellant's counsel estimated a \$200,000 reduction in attorney's fees and a \$10,000 reduction in costs as a result of a mediated settlement. The average estimated savings per settlement were \$76,298. For the 94 settled cases, the cumulative estimated savings for the parties were \$7,172,012.

For appeals that did not settle, the average estimated increase in attorney's fees was \$2,989 for appellants and \$2,402 for respondents. The average estimated cost increase was \$1,691 for appellants and \$692 for respondents. The average estimated increased attorney's fees and costs for the 121 cases that did not settle were \$7,774, for a cumulative total of \$940,654. Thus, the estimated net savings to parties participating in the mediation program were \$6,231,358.

COURT SAVINGS

FIRST APPELLATE DISTRICT OF THE COURT OF APPEAL

The most expensive phase of the appeal for the court occurs after the respondent's brief is filed. At that point the justices and their research attorneys may begin to review the record and the briefs. Conferences, oral argument, and opinion writing follow. The mediation program is designed for early intervention, before this court involvement. Since all 94 reported settlements occurred before respondents' briefs were filed, there was a significant saving of court resources.

There is evidence that mediation is an effective tool for reducing appellate

Counsel participating
in the mediation
program estimated
net savings exceeding
\$6.2 million.

court caseloads. The number of dispositions before judicial involvement for civil appeals in the First Appellate District in fiscal year 2000/2001 was 32 percent for nonmediated cases.⁵ With the inclusion of mediated cases, the disposition rate increased to 39 percent. The 7 percent improvement with mediated settlements is consistent with the 7 percent of civil appeals (89/1,333) resolved in mediation in 2000/2001.

TRIAL COURTS WITHIN THE FIRST APPELLATE DISTRICT

Appellate mediation significantly benefited not only the Court of Appeal, but the trial courts within the First Appellate District as well, in two ways.

As discussed above, a number of mediated appeals result in global settlements that resolve ongoing trial court litigation as well as one or more appeals. In addition, mediated resolution of appeals reduces the number of cases that are sent back to the trial courts for trial, retrial, or other proceedings.

In FY 2000/2001, the First Appellate District of the Court of Appeal reversed 26 percent of trial court judgments in civil cases in whole or in part. Most of the cases were remanded to the trial courts for further proceedings. Statistically, a proportionate number of successfully mediated cases also would have been reversed had they not been resolved. To the extent that settlement obviated the need for further trial court action, there was a saving to the trial courts, as well as to the parties and to the Court of Appeal. The effect is to reduce trial court backlogs and thereby increase public access to the justice system.

OTHER BENEFITS

It is said that the only failed mediation is one in which the parties leave in a worse position than when they came in.⁶ The ultimate goal of court-connected mediation is an agreement that meets the interests of the parties better than a resolution by the court. However, the parties, and the court, usually benefit even when appeals are not resolved in mediation. Mediation normally highlights the strengths and weaknesses of each party's position. Consequently, the parties tend to focus on these factors in pursuing the appeal to a conclusion. This normally makes for better briefs and oral argument, to the profit of both the parties and the court.

OTHER PROGRAM STATISTICS

Pertinent statistics and evaluative data are obtained from the Mediator's Statement (Attachment 9). Attachment 11 is a data report compiled from completed Mediator's Statements and Mediation Evaluations. (See Attachment 10.)

⁵The pilot program became operational in February 2000. The rate of settlements steadily increased during the pilot period. As a result, 89 of the 94 dispositions from mediated settlements occurred in fiscal year 2000/2001. Accordingly, the effect of the mediation program was most evident in that year.

⁶Remarks of Richard J. Collier, Esq., at the January 4, 2001, meeting of the Mediation Subcommittee of the Bar Association of San Francisco. Mr. Collier is co-chair of the subcommittee.

There is evidence that mediation is an effective tool for reducing appellate court caseloads.

Appellate mediation significantly benefited not only the Court of Appeal, but the First Appellate District trial courts as well.

Participant evaluations of the mediation program were very positive. The great majority of the parties and attorneys would use the mediation process and the mediator again.

The Mediator's Statement is designed primarily to inform the administrator of the time required for preparation and mediation and whether the case resolved in whole or in part. Confidential information is excluded. The statement is to be submitted to the administrator within 10 days of the mediation's completion.

Significant findings from the Mediator's Statements include:

- Mediators devoted an average of 9.3 hours to a case. This included 3.1 hours preparation, 5.6 hours session time, and .6 hours telephone follow-up.
- The average number of mediation sessions was 1.1.
- The average mediator fee was \$175, paid voluntarily by the parties when pro bono time was exceeded.
- The primary style for 74 percent of the mediators was facilitative rather than evaluative. This is a fundamental difference between the mediation program and settlement conferences.
- Counsel for the parties were trial attorneys, rather than appellate specialists, in 97 percent of the mediations.
- In 95 percent of the cases that did not settle, the parties reached an impasse.⁷

PARTICIPANT EVALUATIONS

Under local rule 3.5(d)(10), all parties and their counsel participating in mediation must submit a Mediation Evaluation (Attachment 10) within 10 days of completion of the mediation. Party representatives who participate in the mediation also are encouraged to submit evaluations.⁸ Each person submitting a form is asked to rate the mediation process, the mediator, and program administration on a 1 (very dissatisfied) to 5 (very satisfied) scale. The midpoint is 3.0.

There are five rating factors for the mediation process: appropriateness of the process, fairness, opportunity to participate, confidentiality, and satisfaction with the outcome. There are four factors for rating the mediator: impartiality, temperament, knowledge of the mediation process, and knowledge of the subject matter. Program administration rating factors include efficiency (scheduling, etc.), courtesy and cooperation, paperwork (filling out forms and preparing mediation briefs), and the mandatory participation requirement. In addition, participants indicate if they would use the mediation process and the mediators again. Mediators also rate program administration, using the same factors, except for the mandatory participation requirement. Instead, mediators rate the requirement that they serve pro bono.

⁷Settlements were thwarted in a few cases because a participant did not have authority to settle, contrary to the mediation program rules. The court has since strengthened its attendance rules and has adopted a standing order requiring all parties and insurance representatives to participate in the mediation, with full settlement authority.

⁸Party representatives may include persons from insurance companies, human relations departments, or corporations, among others.

PARTY EVALUATIONS

The average ratings from both appellants and respondents were very positive. The average scores for the mediation process were high (4.2 or greater) for fairness, opportunity to participate, and confidentiality. The lowest ratings were for appropriateness of the process (3.9 by appellants; 3.5 by respondents) and satisfaction with the outcome (2.6 by appellants; 3.0 by respondents). The satisfaction ratings are understandable, because the majority of appeals did not settle in mediation during the pilot period. Eighty-two percent of the parties (148/181) would use the mediation process again.

Parties gave the mediators high ratings in all categories. The lowest ratings were for knowledge of the subject matter (4.0 by appellants; 4.3 by respondents). This is probably because mediators may be assigned based on their mediation process skills, rather than their specific subject matter expertise. Eighty-eight percent of the parties (167/190) would use the mediator again.

Parties also gave high ratings to program administration. The lowest ratings, predictably, were for mandatory participation (3.8 by appellants; 3.5 by respondents).

Party ratings were higher than expected, given that a number of parties had reservations about mediation. A number of the parties praised the mediators, the mediation process, or program administration. Some of the comments were:

- ▶ “[His mediation] allowed for a fair and impartial meeting, which had been very difficult to obtain within [] County. His willingness to understand many of the individual issues helped to mediate a solution of the entire issue. This form of mandatory mediation is extremely helpful in getting a reticent party to be forced to confront the issues. It has saved the court, and the appellant, long and costly litigation.”
- ▶ “[The] main advantage in this case was that the mediation forced the parties to get together and discuss the case intelligently and with focus.”
- ▶ “Excellent mediator. I am very impressed and satisfied with the way he handled everything.”
- ▶ “Mediator did a good job of helping each side creatively approach the other.”
- ▶ “[He] did an excellent job as mediator. He appeared to be extremely fair and impartial, and displayed an even temperament. He was both courteous and cooperative throughout the mediation process.”
- ▶ “[The mediator] did a fine job—we appreciate his assistance and efforts.”
- ▶ “My first mediation experience and was very positive.”
- ▶ “Good way to resolve disputes—by getting all parties together.”
- ▶ “In general, we would like to say that we were very pleased with being provided the opportunity to participate in the program and would encourage others to do so.”

Some parties felt that mediation was a waste of time and money, usually because they felt that other parties were unwilling to compromise. Some of their comments were:

- ▶ “Felt it was a waste of my time because respondent did not intend to settle.”
- ▶ “Opposition was not cooperative and did not wish to discuss settlement.”
- ▶ “We wanted to work things out but the other party had no intention of giving in or cooperating in the least.”

“In general, we would like to say that we were very pleased with being provided the opportunity to participate in the program and would encourage others to do so.”

"I am *enthusiastic* about the program. The ordered (by Court) mediation forced parties to talk to each other, which could not have happened in our case absent the court-ordered mediation."

- ▶ "Unless both parties ask or the scales are balanced, I think mediation at the appellate level is a waste of money."
- ▶ "Instead of mandatory, someone should examine party's interests. In this case the P's attorney came in with a chip on his shoulder and announced he was only there because he was ordered."
- ▶ "Mediator should be knowledgeable on the subject matter of the litigation."
- ▶ "Fact that respondent was not required to be present at mediation (supposedly due to health problems) was probably detrimental to the process."
- ▶ "Mediator ought to give opinion about case."

COUNSEL EVALUATIONS

Counsel evaluations of the mediation process, as to appropriateness of the process, fairness, opportunity to participate, and confidentiality, were consistent with the high ratings by the parties. Satisfaction with the outcome was higher for counsel than for their clients (2.9 for appellant's counsel versus 2.6 for appellants, 3.2 for respondent's counsel versus 3.0 for respondents). Ninety-three percent of counsel (283/304) were willing to use the mediation process again. These findings may reflect that attorneys are more cognizant that mediation involves compromise.

Counsel ratings of the mediators and program administration also were consistent with those of their clients. No average rating of the mediator was below 4.2, which was for knowledge of the subject matter. Eighty-seven percent (263/301) would use the mediator again. Program administration also received high scores, with the lowest ratings for mandatory participation (3.9 by appellant's counsel; 3.6 by respondent's counsel).

Some evaluations were received from counsel representing additional parties in appeals. They estimated average net savings in attorney's fees ranging from \$2,200 (respondents) to \$13,720 (appellants). The mediation process, the mediator, and program administration again received high ratings.

The comments of counsel illustrate the value of the appellate mediation process:

- ▶ "[The mediator] made all the difference between years of protracted post-litigation appeals and prompt settlement. A jewel. Not enough superlatives available. An extremely appropriate choice for mediation of this case."
- ▶ "The selection of [the mediator] for the mediation in this employment discrimination case was either a stroke of genius or great luck for the parties and the court of appeal. [She] was able to guide the parties toward a settlement in a difficult situation. Only her unique knowledge of the law and personal temperament could have brought settlement."
- ▶ "This was a very contentious case with high emotions and many unresolved side issues. [The mediator] was very skilled in bringing the parties together, and sensitive to their emotional needs. His effort level and persistence was exceptional."

- “[The mediator’s skills] were essential to the mediation of this matter. His willingness to work a very long day until a written agreement was fully executed was also a key factor in the settlement process.”
- “Mediator worked extremely hard to resolve this difficult case. We appreciate his time and effort and he offered to continue to be involved.”
- “[The mediator] was great in many ways. Handled some potentially explosive situations very well.”
- “This mediation not only resolved this case, but it also resolved another potential case.”
- “Be advised this matter settled. I wish to express my support in the program and my approval to [the mediator] for his highly professional assistance that led to resolution.”
- “I was impressed by [the mediator’s] command of the material, his familiarity of subtle case procedural and substantive issues as well as his demeanor and professionalism. Your program is well served by such a mediator.”
- “The mediator accomplished an outcome that surpassed my most optimistic expectation.”
- “The process was outstanding; the mediator was even better. Great job done by all involved.”
- “[The time savings by the court] would include the time to review the briefs, conduct oral argument and write and issue an opinion.”
- “[She] was a *superb* mediator. We started out so far apart that I thought we would be on a 12:00 flight to Los Angeles.”
- “I am *enthusiastic* about the program. The ordered (by Court) mediation forced parties to talk to each other, which could not have happened in our case absent the court-ordered mediation. Sometimes lawyers keep parties apart to the detriment of a negotiated settlement. This should be available on the trial court level, too.”
- “The long-standing hostility felt by appellants against respondent has made it impossible for them to consider a reasonable compromise. The basic issue is not money, but a deeply felt anger. That the mediator was able to obtain even a tentative resolution represents a masterpiece.”

A number of attorneys questioned whether mediation was appropriate for their clients’ appeals:

- “This case didn’t settle, in my opinion, because respondent was not participating in good faith.”
- “Mediation was frustrated by respondents’ greed and viciousness.”
- “Case was not suitable. Apparently bank did not plan to offer serious money so process was a waste of time in this instance.”
- “Do not force it unless all parties are in favor of it.”
- “The appellant was not serious about settling this case.”
- “Parties started—and remained—far apart. Mediator did not even share either side’s ‘number’ at any time.”
- “I did not feel the mediator adequately exercised his critical faculties but instead simply relayed the other party’s comments.”
- “There was no commitment to the process on the part of the respondent. Without such commitment, mediation is a waste of time.”

"[The mediator's] analysis helped me understand my need to clarify some of my appellate arguments."

"[He] was the best mediator I have ever had the pleasure of working with in 16 years of service in the industry."

- ▶ "Due to the procedural posture of this case in the trial court, this case was not suited for mediation. As much could have been accomplished by a conference call between counsel and the mediator at a considerable savings."
- ▶ "I think a female, more emotional mediator might have been better for this case to get in touch with plaintiff herself."

There was positive feedback in a number of cases that did not settle at the mediation. For example, this comment demonstrates another benefit of the process:

"[The mediator's] analysis helped me understand my need to clarify some of my appellate arguments. While I am disappointed the case did not resolve, I benefited because my need to clarify two points in my brief was made plain to me by [the mediator]."

OTHER EVALUATIONS

Party representative evaluations of the mediation process generally were even more favorable than those of the parties and counsel. Ratings for the appropriateness of the mediation process were significantly higher (3.8 by appellants' representatives; 4.1 by respondents' representatives). All but one party representative who submitted an evaluation would use the mediation process again. Both groups rated satisfaction with the result at 3.2.

Party representatives commented positively on mediator skills. A veteran insurance adjuster had this praise for the mediator in a complex commercial dispute:

"[He] was the *best mediator* I have ever had the pleasure of working with in 16 years of service in the industry. Although the process did not affect a resolution, it was certainly not due to [his] participation. He demonstrated an excellent command of the legal and factual issues in [the case]. Further, he was an ardent facilitator and was not shy about expressing his opinions on the case. His presence was a refreshing change to most of the pedestrian mediators I often encounter . . ." [Emphasis in the original.]

Party representatives gave high ratings also to other mediators. Ninety percent (43/48) would use the mediator again.

The highest marks for program administration came from the mediators. Program efficiency was rated at 4.9. The lowest rating by the mediators was for the pro bono requirement (3.6).

In addition to these evaluations, a number of letters have been received commending the mediators and the mediation program. Mediation participants attest that the mediation program has been meeting its goals of reducing costs, reducing the time to resolution, reducing the adversary nature of litigation, and increasing litigant satisfaction with the judicial process. (Attachments 12 through 16 are a sampling of these commendations.) Further, program achievements have been recognized in legal publications. (See Attachments 17 and 18.)

RECOMMENDATIONS

1. The mediation program should be extended indefinitely in the First Appellate District.

The pilot program has achieved its goals. The risks, costs, and stress of litigation have been reduced for the parties. Court resources have been conserved. Positive evaluations of the mediation process, the mediators, and the mediation program demonstrate increased litigant satisfaction with the judicial process. The results have been consistent with the judiciary's primary goal of greater public access to the courts.

2. Participation in the mediation program should continue to be mandatory.

In the task force's February 1998 report, it was recommended that participation in the mediation program should be compulsory, as it is in the Fourth Appellate District, Division Two, in Riverside; the Courts of Appeal in Oregon and Hawaii; and in the Ninth and District of Columbia Circuits of the United States Court of Appeals. As discussed above, without court authority to take the lead and to submit appeals to mediation, counsel for the parties tend not to discuss settlement at the appellate level. As a result, substantially fewer cases would be settled if participating in the program were voluntary. This has been the court's experience with its settlement conference program under local rule 3 and was the principal reason for the adoption of the mandatory mediation program. Furthermore, there are a significant number of appeals in which counsel feel that mediation is appropriate but where their clients are reluctant to participate. The court's authority to mandate mediation gives counsel the ability to have the parties take part by placing the responsibility to initiate mediation on the court.

Although the mediation program is nominally mandatory, in practice it is rare for a case to be submitted if any party is firmly opposed to mediation. The experience gained in the pilot program has revealed two reasons for this policy. First, a case is not likely to settle if a party is unwilling to compromise. Second, the court does not want parties to incur additional litigation expenses if mediation is likely to be futile. The limited exception to this policy occurs when a case involves strong interests that a skilled mediator may utilize to bring the parties to agreement. Once a case is submitted to the mediation program, the court must have the authority to enforce the mediation process. For example, the court's mediation rules require that all parties and insurance representatives attend mediation sessions with full authority to settle the appeal. The primary goals of mandatory appellate mediation are the same as for mandatory settlement conferences in the trial court: to save the parties the cost and risk of further litigation and to conserve court resources.

The mediation program should be extended indefinitely in the First Appellate District.

Participation in the mediation program should continue to be mandatory.

Mediator training and reasonable mediator compensation are recommended for a successful appellate mediation program.

3. Court-sponsored training should remain an integral part of any appellate mediation program.

Most of the success of the pilot program is attributable to the skills of excellent mediators and the quality of the appellate mediation training they have received. While the mediation process is similar in any context, there are additional challenges at the appellate level. Mediators who are experienced with pretrial disputes must learn the appellate process, the standards of appellate review, and the risks and costs of appeal. Conversely, appellate specialists must learn the principles and skills of mediation.

Because of the pivotal role quality training has played in the success of the program, we urge that funds be made available to other appellate districts for training in the event they elect to expand or initiate mediation programs.

4. The program should retain its pro bono feature. However, the number of pro bono hours demanded from mediators should be limited. After the limit has been reached, mediators should receive reasonable compensation from the parties.

Most mediators believe in pro bono service in its customary form, for parties who have little or no ability to pay the mediator's fees. However, in litigation, and especially in appeals, many parties are able to share in the cost of the mediator's services. A large number of appeals submitted to the program involved corporate or public entities whose attorneys are well compensated for participating in mediation and who obtain substantial savings through the process. There is anecdotal evidence suggesting that many parties involved in these mediations were willing to pay for the valuable services they receive from the mediators.

Retaining the court's current level of pro bono commitment is likely to create an obstacle to the long-range ability to retain quality mediators. A panel mediator must balance public service with the need to make a living. The great majority of panel mediators are sole practitioners or members of small firms. Their ability to donate pro bono time is limited. Furthermore, given the proliferation of ADR programs sponsored by state and federal trial courts in Northern California, we must accept the fact that the court competes with these programs for the pro bono services of many of the same mediators.

These concerns have been reflected in comments received from a significant number of panel mediators. The following is a sampling:

- "I am very willing to work pro bono where parties cannot afford to pay. A blanket pro bono rule diminishes the role of the profession of mediation."
- "Pro bono requirement should be based on economic need of the parties. It is not reasonable for mediator not to be paid when parties capable of paying and both attorneys are paid."
- "I enjoyed assisting these litigants in helping them resolve both the appeal and related potential legal and practical issues, but it was very difficult and time consuming and to expend so much time so intensely without any compensation at all is discouraging."
- "Since I do not get paid for time away from my regular job it costs me money out of pocket to do these cases. I hope this will be changed soon."

- “I enjoyed the challenge and experience gained in mediating this case. I do think, however, four hours donated hearing time rather than six would be more equitable.”

In recognition of these concerns and of the benefits to the parties, parties should provide reasonable compensation for the mediators, although at significantly reduced rates. This can be achieved by limiting pro bono time. During the pilot program, mediators donated preparation time and six hours of actual mediation time. A limitation to preparation time and four hours of actual mediation time would be a reasonable adjustment of the compensation imbalance that would give due recognition to the contributions of the mediators to the success of the mediation program.

Mediators are professionals, no less than the attorneys whose clients the mediators serve. It is in everyone’s interest in maintaining mediation services of the highest quality that mediators receive reasonable compensation. Limiting the time mediators must donate to the program strikes the proper balance between the needs of the program and the recognition that the services provided come at a substantial cost to the mediators’ practices. Mediators also should be reimbursed for reasonable out-of-pocket expenses under State Board of Control provisions. This would include, for example, mileage and parking.

5. The results of the pilot program are achievable in other appellate districts. Other appellate districts should have the option of developing or expanding their own alternative dispute resolution programs, with the financial assistance of the Administrative Office of the Courts, if necessary.

The pilot program is but one of the alternative dispute resolution programs that exist or are likely to be established in the districts of the Court of Appeal. Division Two of the Fourth Appellate District, located in Riverside, has had a successful mandatory mediation program since 1991. Most of the mediators are attorneys. The Second Appellate District maintains a voluntary mediation program, also utilizing the services of attorneys. There are indications that other districts or divisions may wish to establish alternative dispute resolution programs within the next few years. The First Appellate District pilot program has well demonstrated that these programs should be supported in the public interest.

ATTACHMENTS

Other appellate districts should have the option of developing or expanding an appropriate form of alternative dispute resolution.
